**JAMES D. THOMAS, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.**
**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**
**2022 U.S. App. LEXIS 28409**
**No. 22-3361**
**October 12, 2022, Filed**

**Editorial Information: Prior History**

Thomas v. United States, 2022 U.S. App. LEXIS 23148 (6th Cir., Aug. 18, 2022)

**Counsel** **{2022 U.S. App. LEXIS 1}**JAMES D. THOMAS, Petitioner - Appellant, Pro se, Ray Brook, NY.

For UNITED STATES OF AMERICA, Respondent - Appellee: Christopher John Joyce, Office of the U.S. Attorney, Akron, OH.

**Judges:** Before: CLAY, BUSH, and MURPHY, Circuit Judges.

**Opinion**

ORDER

James D. Thomas petitions for rehearing en banc of this court's order entered on August 18, 2022, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

**JAMES D. THOMAS, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.**
**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**
**2022 U.S. App. LEXIS 23148**
**No. 22-3361**
**August 18, 2022, Filed**

**Editorial Information: Prior History**

Thomas v. United States, 2022 U.S. Dist. LEXIS 57535, 2022 WL 911777 (N.D. Ohio, Mar. 29, 2022)

**Counsel** **{2022 U.S. App. LEXIS 1}**JAMES D. THOMAS, Petitioner - Appellant, Pro se, Ray Brook, NY.

For UNITED STATES OF AMERICA, Respondent - Appellee: Christopher John Joyce, Office of the U.S. Attorney, Akron, OH.

**Judges:** Before: McKEAGUE, Circuit Judge.

**Opinion**

ORDER

James D. Thomas, a pro se federal prisoner, appeals the district court's judgment denying his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. The court construes Thomas's notice of appeal as an application for a certificate of appealability (COA). *See* Fed. R. App. P. 22(b)(2). Thomas moves the court to proceed in forma pauperis and for appointment of counsel.

Ohio state task-force agents in Summit County received information and developed evidence that Thomas was selling methamphetamine to an individual who lived in Pennsylvania named Sondra McQuillen. After obtaining separate warrants from an Ohio judge, the agents executed searches on Thomas's residence and the barber shop that he apparently owned. The agents discovered methamphetamine, cocaine, and firearms at both locations. *See United States v. Thomas*, 852 F. App'x 189, 190-92 (6th Cir. 2021). A federal grand jury in the Northern District of Ohio then returned an indictment charging Thomas with possession with intent to distribute more than 500 grams of methamphetamine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A), possession**{2022 U.S. App. LEXIS 2}** with intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B), possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C), possession of firearms and ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1), and possession of a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A).

Thomas filed motions to suppress the evidence seized from his house and the barber shop, contending that the applications for the warrants failed to establish probable cause to support the searches and that the agent who had applied for the warrants made material misrepresentations in his supporting affidavits. *See Thomas*, 852 F. App'x at 192. The district court denied Thomas's motions to suppress after a hearing. *See id.* at 193.

Next, the grand jury returned a superseding indictment that charged Thomas with two counts of possession with intent to distribute methamphetamine (counts 1 and 4), two counts of possession with intent to distribute cocaine base (counts 2 and 5), two counts of possession with intent to distribute cocaine (counts 3 and 6), one count of being a felon in possession of firearms and ammunition (count 7), and two counts of possession of a firearm in furtherance of a drug-trafficking crime (counts 8 and 9).**{2022 U.S. App. LEXIS 3}** Thomas entered a conditional plea of guilty to each count of the superseding indictment. At sentencing the government dismissed the second of the two § 924(c) counts (count 9). The district court sentenced Thomas to concurrent terms of 120 months of imprisonment on counts 1 through 7 and to a consecutive term of 60 months of imprisonment on count 8, for a total term of 180 months of imprisonment. This court affirmed the district court's denial of Thomas's motions to suppress on direct appeal. *See Thomas*, 852 F. App'x at 190.

Thomas then filed a timely § 2255 motion in the district court, raising the following claims: (1) the district court erred by failing to dismiss the two § 924(c) counts because his plea colloquy failed to establish that he actively employed the firearms, (2) his trial counsel performed ineffectively by failing to raise meritorious issues in his motions to suppress, (3) his trial counsel performed ineffectively by not requesting and obtaining investigative reports prepared by Pennsylvania law enforcement officers on which the case agent relied to obtain the search warrants, (4) the prosecution suppressed evidence concerning the Pennsylvania investigation, (5) Thomas's appellate attorney performed ineffectively**{2022 U.S. App. LEXIS 4}** by failing to argue that his § 924(c) conviction was unconstitutional, and (6) his trial attorney performed ineffectively by failing to advise him of the procedures for conducting a hearing under *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). The district court concluded that Thomas's claims were either meritless or procedurally defaulted, denied the motion to vacate, and declined to grant Thomas a COA.

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the applicant must demonstrate that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). When a district court denies a motion to vacate on procedural grounds, the applicant must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

Thomas's first and fifth claims are related. Thomas claimed that the district court should have sua sponte dismissed**{2022 U.S. App. LEXIS 5}** the § 924(c) counts because there was no factual basis for concluding that he actively employed the firearms while committing the underlying drug-trafficking crimes. Relatedly, Thomas claimed that his appellate attorney performed ineffectively by not raising this issue on direct appeal. The district court denied Thomas's first claim because § 924(c) criminalizes the possession of a firearm in furtherance of a drug-trafficking crime, and his admissions during the change-of-plea colloquy established a sufficient factual basis for his conviction. The district court denied Thomas's ineffective-assistance claim because any argument that his § 924(c) conviction was unconstitutional would have been meritless, and counsel is not required to raise meritless issues. Reasonable jurists would not debate either of those conclusions.

A prior version of § 924(c) criminalized using or carrying a firearm during and in relation to a crime of

violence or a drug-trafficking crime. As interpreted by the Supreme Court, "use" of a firearm under this version of the statute meant "active employment of the firearm." *Bailey v. United States*, 516 U.S. 137, 143, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995). Consequently, the mere possession of a firearm by the defendant during the commission of a drug offense was insufficient for**{2022 U.S. App. LEXIS 6}** a conviction; instead, the government had to prove that the defendant used the firearm in way that made it "an operative factor in relation to the predicate offense." *Id.* But in 1998 Congress amended § 924(c) to criminalize the possession of a firearm in furtherance of the commission of a predicate offense-an amendment known as the "*Bailey* fix." *Welch v. United States*, 578 U.S. 120, 133, 136 S. Ct. 1257, 194 L. Ed. 2d 387 (2016); *United States v. O'Brien*, 560 U.S. 218, 232-33, 130 S. Ct. 2169, 176 L. Ed. 2d 979 (2010).1

Here, count 8 of the superseding indictment charged Thomas with possessing a firearm in furtherance of the drug-trafficking crimes alleged in counts 1 through 3, and count 9 did the same with respect to the drug-trafficking crimes alleged in counts 4 through 6. During his change-of-plea colloquy, Thomas admitted that he possessed firearms, in particular a shotgun, several revolvers, and a 9mm semi-automatic pistol, in furtherance of those crimes. He did not express any confusion about the elements of the offense. These admissions were sufficient by themselves to establish a factual basis for his guilty plea. *See United States v. Dennis*, 549 F. App'x 408, 414-15 (6th Cir. 2013). Moreover, Thomas was a convicted felon who illegally possessed multiple firearms in a house where large amounts of narcotics were discovered. The search-warrant return from Thomas's house indicates that agents discovered firearms in a kitchen**{2022 U.S. App. LEXIS 7}** cabinet in close proximity to suspected narcotics and other drug-trafficking paraphernalia. *See United States v. McCreary-Redd*, 475 F.3d 718, 722 n.1 (6th Cir. 2007) (stating that, in reviewing whether the district court correctly concluded that there was a sufficient factual basis for the guilty plea, this court "may examine the entire record, including proceedings that occurred *after* the plea colloquy." (quoting *Spiridigliozzi v. United States*, 117 F. App'x 385, 391 (6th Cir. 2004))). These facts also provided a sufficient basis for Thomas's guilty plea. *See United States v. Walker*, 828 F.3d 352, 355-56 (5th Cir. 2016); *United States v. Ray*, 803 F.3d 244, 264-65 (6th Cir. 2015).

And because there was a sufficient factual basis for Thomas's guilty plea, reasonable jurists would not debate whether his appellate attorney performed ineffectively by not raising this issue on appeal. *See Coley v. Bagley*, 706 F.3d 741, 752 (6th Cir. 2013) ("Omitting meritless arguments is neither professionally unreasonable nor prejudicial.").

Thomas's second claim is that his trial attorney performed ineffectively in litigating his motions to suppress by not addressing certain alleged falsehoods in the affidavits that the agent filed in support of the search-warrant applications. These alleged falsehoods concerned whether there were recorded conversations between Thomas and McQuillen, the number of times McQuillen visited Thomas, whether drug paraphernalia was found in Thomas's trash, and whether Ronnie Sue**{2022 U.S. App. LEXIS 8}** Hummel, who was one of McQuillen's associates, made "unfounded" statements about Thomas. The district court denied this claim, finding that during the suppression hearing Thomas's attorney questioned the agent about the absence of incriminating conversations with McQuillen and the sufficiency of the evidence recovered during the trash pulls. Further, the court found that Thomas had not overcome the presumption that his attorney performed effectively by raising only those issues that were mostly likely to succeed.

There is a "strong presumption" that a criminal defendant's attorney provided constitutionally effective representation. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel is not required to raise every potentially meritorious issue to avoid a charge of providing ineffective assistance. *Cf. Hand v. Houk*, 871 F.3d 390, 410 (6th Cir. 2017).

Here, as the district court found, Thomas's attorney questioned the case agent about Thomas's conversations with McQuillen. The agent admitted that, despite representations in his search-warrant affidavits to the contrary, there were no incriminating conversations between Thomas and McQuillen about drug trafficking. So Thomas's attorney actually raised one of the issues that Thomas now claims he unreasonably omitted. As to the**{2022 U.S. App. LEXIS 9}** other allegedly omitted issues, Thomas failed to make any showing that the agent's affidavits were materially false. *See Franks*, 438 U.S. at 171 (holding that, to mandate an evidentiary hearing on a search-warrant affidavit, "the challenger's attack [on the affiant's veracity] must be more than conclusory"). In the absence of such evidence, reasonable jurists would not debate whether trial counsel's decision not to raise the allegedly omitted issues fell "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. Reasonable jurists therefore could not disagree with the district court's resolution of this claim.

Thomas's third claim is that his attorney performed ineffectively by not obtaining the investigative reports prepared by agents in Pennsylvania. He argued that these reports would have revealed more falsehoods and omissions in the case agent's search-warrant affidavits. The district court denied this claim, finding that Thomas's attorney actually received the reports during discovery, that counsel was in communication with the prosecutor in Pennsylvania who was in charge of the investigation into Thomas's activities, and that counsel exercised reasonable professional judgment in declining to**{2022 U.S. App. LEXIS 10}** review the reports. The court concluded further that Thomas was not prejudiced by counsel's alleged failure to obtain the reports because his assertion that the reports would reveal inconsistencies was unfounded.

Reasonable jurists would not debate that conclusion. Although Thomas disputed whether the case agent's affidavits established probable cause to issue the search warrants, he failed to point to any specific and material discrepancies between the case agent's affidavits and the investigative reports. His conclusory assertion that the affidavits contained such falsehoods is insufficient to overcome the presumption that his attorney performed effectively in litigating the motions to suppress. *See Wogenstahl v. Mitchell*, 668 F.3d 307, 335-36 (6th Cir. 2012).

Thomas's fourth claim is that prosecutors suppressed the investigative reports from Pennsylvania, in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). As in the previous ineffective-assistance claim, Thomas argued that the reports contained information that would have undermined the truthfulness of the case agent's search-warrant affidavits. The district court denied this claim because Thomas failed to demonstrate that the reports contained material and favorable information, inasmuch as they concerned uncharged conduct**{2022 U.S. App. LEXIS 11}** that occurred outside of Ohio. Moreover, the court found, Thomas's attorney was aware of the reports and had requested and received the reports from the prosecution. Finally, the district court found that Thomas procedurally defaulted this claim by not raising it on direct appeal.

*Brady* requires the prosecution to disclose to the defense any information that is material to the defendant's guilt or punishment, *Brady*, 373 U.S. at 87, as well as any evidence that can be used for impeachment, *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). Thomas admitted that he received the investigative reports while his appeal in this case was pending, and yet he failed to file them with his motion to vacate. Consequently, there is no basis upon which a reasonable jurist could conclude that the prosecution suppressed investigative reports that would have assisted him during the suppression hearing. *See* Rule 2(b)(2) of the Rules Governing § 2255 Proceedings (requiring the movant to state the facts supporting each ground for relief). Thomas therefore failed to demonstrate a *Brady/Giglio* violation. Consequently, reasonable jurists would not debate the district court's resolution of this claim.

Thomas's sixth and final claim is that his attorney performed ineffectively by not advising him of the procedural rules that govern a *Franks*{**2022 U.S. App. LEXIS 12**} hearing. He asserted that, properly advised, he would have been able to provide an affidavit that demonstrated falsehoods in the case agent's search-warrant affidavits. The district court denied this claim, finding that Thomas was not prejudiced because he failed to offer any proof that the agent made deliberate or reckless falsehoods in his affidavits. As just discussed with regard to the preceding claims, reasonable jurists would not debate that conclusion.

Accordingly, for the reasons stated, the court **DENIES** Thomas's COA application and **DENIES** all other pending motions as moot.

**Footnotes**

1

In his reply memorandum, Thomas argued for the first time that his attorney performed ineffectively by not advising him that Congress had amended § 924(c). Thomas asserted that had he known of the amendment, he would not have rejected an earlier plea offer from the government for a lower sentence. The district court refused to consider this claim because Thomas did not raise it in his motion to vacate and had not moved for leave to amend. Reasonable jurists would not debate that decision. *See Rice v. Warden, Warren Corr. Inst.*, 786 F. App'x 32, 38 (6th Cir. 2019) (holding that a habeas petitioner forfeits any claim not raised in his petition).

**JAMES D. THOMAS, Petitioner, v. UNITED STATES OF AMERICA, Respondent.**
**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION**
**2022 U.S. Dist. LEXIS 57535**
**CASE NO. 5:18 CR 00461**
**March 29, 2022, Decided**
**March 29, 2022, Filed**

**Editorial Information: Subsequent History**

Certificate of appealability denied, Motion denied by, As moot Thomas v. United States, 2022 U.S. App. LEXIS 23148 (6th Cir., Aug. 18, 2022)

**Editorial Information: Prior History**

United States v. Thomas, 852 Fed. Appx. 189, 2021 U.S. App. LEXIS 11884, 2021 WL 1549773 (6th Cir. Ohio, Apr. 20, 2021)

**Counsel** **{2022 U.S. Dist. LEXIS 1}**For United States of America, Plaintiff: Christopher J. Joyce, Office of the U.S. Attorney - Akron, Akron, OH; Henry F. DeBaggis, II, Office of the U.S. Attorney - Cleveland, Cleveland, OH; Michelle M. Baeppler, Office of the U.S. Attorney - Akron, Akron, OH; Phillip J. Tripi, Former Assistant US Attorney.

**Judges:** Donald C. Nugent, United States District Judge.

**Opinion**

**Opinion by:** Donald C. Nugent

**Opinion**

MEMORANDUM OPINION

This matter comes before the Court upon James Thomas's (hereinafter Mr. Thomas) Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255. (ECF #112). In Mr. Thomas's motion, he raises six grounds for relief: (1) the District Court erred by not dismissing Counts 8 and 9 at the time of sentencing because there was not a factual basis to convict for violation of 18 U.S.C. § 924(c)(1); (2) violation of *Brady v. Maryland* by the prosecution; (3) ineffective assistance of trial counsel for failure to raise issues in a brief for a Franks Hearing; (4) ineffective assistance of trial counsel for failure to request and obtain investigation reports; (5) ineffective assistance of appellate counsel for failing to raise issues on appeal; and (6) ineffective assistance of counsel for failing to advise on the procedures of a Franks Hearing.**{2022 U.S. Dist. LEXIS 2}** (ECF #112).

**Background**

On August 15, 2018, Mr. Thomas was charged in a five-count indictment. On October 8, 2019, the government filed a nine-count superseding indictment, charging Mr. Thomas with: (1) possession with the intent to distribute methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B); (2) possession with the intent to distribute crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and

(b)(1)(C); (3) possession with the intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C); (4) possession with the intent to distribute methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A); (5) possession with the intent to distribute crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C); (6) possession with the intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C); (7) being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); and (8) two counts of possessing a firearm in furtherance of a drug trafficking offense, in violation of 18 U.S.C. § 924(c)(1)(A). (ECF #57).

On November 20, 2019, Mr. Thomas pled guilty to all nine counts and reserved in writing his right to appeal the district court's denial of his suppression motions. On March 12, 2020, the Court sentenced Mr. Thomas to 120 months as to Counts 1-7, to be served concurrently, 60 months as to Count 8 to be served consecutively**{2022 U.S. Dist. LEXIS 3}** to Counts **1-7**, and 60 months as to Count 9 to be served consecutively to Counts 1-7 and Count 8. (ECF #117). Count 9 was later dismissed and Mr. Thomas's total term of incarceration was reduced to 180 months. The United States Court of Appeals for the Sixth Circuit affirmed the trial court's judgment on appeal. (ECF #117). Subsequently, Mr. Thomas filed this instant motion on November 3, 2021. Now, Mr. Thomas seeks to vacate his sentence pursuant to 28 U.S.C. § 2255 on the basis that the district court erred in not dismissing Counts 8 and 9 at the time of sentencing, the prosecution was in violation of the Brady Rule, and his right to effective assistance of counsel was violated.

**Legal Standard**

A petitioner that moves to vacate, set aside, or correct a sentence pursuant to 28 U.S.C. § 2255 must demonstrate that: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. *See* 28 U.S.C. § 2255; *Hill v. United States*, 368 U.S. 424, 426-27, 82 S. Ct. 468, 7 L. Ed. 2d 417 (1962). As such, a court may grant relief under § 2255 only if a petitioner has demonstrated "a fundamental defect which inherently results**{2022 U.S. Dist. LEXIS 4}** in a complete miscarriage ofjustice." *Griffin v. United States*, 330 F.3d 733, 736 (6th Cir. 2003) (internal quotation and citation omitted). If a § 2255 motion, as well as the files and records of the case, conclusively show that the petitioner is entitled to no relief, then the court need not grant a hearing on the motion. *See* 28 U.S.C. § 2255; *see also Blanton v. United States*, 94 F.3d 227, 235 (6th Cir. 1996) (recognizing that evidentiary hearing is not required when the record conclusively shows that petitioner is not entitled to relief).

To "obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal." *United States v. Frady*, 456 U.S. 152, 166, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982). Once a defendant has waived or exhausted his right to appeal, "we are entitled to presume he stands fairly and finally convicted." Id. at 164. Thus, to prevail on a § 2255 motion, Mr. Thomas must prove by a preponderance of the evidence that his constitutional rights were denied or infringed. *United States v. Wright*, 624 F.2d 557, 558 (5th Cir. 1980).

**Analysis**

**A. The District Court and Counts 8 and 9**

Mr. Thomas alleges that the District Court erred by not dismissing Counts 8 and 9 at the time of sentencing. Mr. Thomas argues that in order to trigger a § 924(c)(1)(A) charge, a firearm must be actively employed by the defendant. (ECF #112). In 1998, § 924(c)(1) was amended to criminalize the conduct of any person who possesses a firearm in furtherance of a drug trafficking**{2022 U.S. Dist. LEXIS 5}** crime. In his Plea Colloquy, Mr. Thomas agreed that on or about July 26, knowing he

had been convicted of crimes punishable by imprisonment for a term exceeding on year, he knowingly possessed a number of firearms and ammunition. (ECF #75). Mr. Thomas asserts in his Reply to the Government's Response that he was not made aware of the 1998 amendment by his trial counsel and that had he been aware he might not have turned down a plea deal. However, Mr. Thomas did not raise an ineffective assistance of counsel claim on these grounds in his § 2255 motion and has not moved to amend his motion. Given the sufficiency of the factual basis supporting Thomas's convictions under § 924(c)(1)(A) and his own admissions, the District Court did not err by failing to dismiss Counts 8 and 9 at the time of sentencing.

**B. Violation of *Brady v. Maryland***

Mr. Thomas also claims that the prosecution violated *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), because it suppressed the investigative reports from the Pennsylvania Office of Attorney General. (ECF #112). The Supreme Court in *Brady* held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or to punishment." *Id.* at 87. For evidence**{2022 U.S. Dist. LEXIS 6}** to be considered material there must be "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). To prevail on a *Brady* claim, Mr. Thomas must also establish that the evidence at issue is favorable to him, that it was suppressed, and that prejudice resulted. *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).

Mr. Thomas claims the reports are material and favorable because they would have shown that Detective Fields made false statements in the affidavit for the search warrants. Mr. Thomas cannot establish that such evidence is material or favorable. The charges in this case resulted from the discovery of drugs and firearms in Mr. Thomas's residence and barbershop. Fields's credibility would not have a bearing on Mr. Thomas's guilt or punishment. As a result, these reports are neither material nor favorable as they relate to uncharged conduct that occurred outside of Ohio. Mr. Thomas has also failed to show that these reports were suppressed. His initial trial counsel had requested these reports and they were turned over to him by the prosecution. The reports were also available for Mr. Thomas's subsequent counsel to inspect. Mr. Thomas himself describes the**{2022 U.S. Dist. LEXIS 7}** reports as "readily available discovery." (ECF #112). As discussed above, Mr. Thomas cannot establish prejudice because access to the reports would not have led to a different result.

Even if Mr. Thomas could meet the requirements for a *Brady* claim, he is procedurally barred from raising this claim because he failed to raise it on direct appeal. A "failure to raise an argument at trial or on direct appeal is waived on collateral review under § 2255, absent a showing of both cause and actual prejudice." *Murr v. United States*, 200 F.3d 895, 900 (6th Cir. 2000) (citing *United States v. Frady*, 456 U.S. 152, 164-65, 167, 102 S. Ct. 1584, 71 L. Ed. 2d 816). A petitioner shows cause by establishing that he was prevented from raising a claim by an external impediment. *Murray v. Carrier*, 477 U.S. 478, 492, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). Mr. Thomas states that he did not raise this claim on direct appeal because he did not believe that his counsel knew the reports were available and he did not discover this until after the appeal was already in progress. This is insufficient to show cause because Mr. Thomas's counsel was aware of the prosecution's possession of these reports and was in contact with the prosecution. Mr. Thomas also cannot show he suffered actual prejudice because he was charged based on search warrants that were executed in Ohio, not the Pennsylvania investigation reports. As a result, Mr.**{2022 U.S. Dist. LEXIS 8}** Thomas is barred from raising this claim.

**C. Ineffective Assistance of Counsel**

Mr. Thomas raised a claim of ineffective assistance of counsel on four grounds: (1) counsel's failure to raise issues in a brief for a Franks hearing; (2) counsel's failure to advise Mr. Thomas on the procedural requirements of a Franks hearing; (3) counsel's failure to request and obtain investigation reports; and (4) counsel's failure to raise certain issues on appeal. (ECF #112).

In order to prevail on an ineffective assistance of counsel claim, a petitioner must show that his counsel's performance was deficient and "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 686-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A petitioner must also establish prejudice. To establish prejudice, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Judicial scrutiny of counsel's performance must be "highly deferential," and counsel's conduct should be evaluated from "counsel's perspective at the time." *Id.* at 689. "[A] defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound legal strategy." *Id.***{2022 U.S. Dist. LEXIS 9}** The question is "whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (quoting *Strickland*, 466 U.S. at 690).

Mr. Thomas's first allegation is that his counsel failed to raise meritorious issues that Mr. Thomas specifically requested be addressed in his brief for the Franks hearing. According to Mr. Thomas, his counsel admitted to only including the issue raised by Mr. Thomas's previous counsel because of time constraints and the belief that he could effectively raise any other meritorious issues during the hearing. Mr. Thomas alleges that his counsel was blocked from raising these issues at the hearing. However, at the hearing, the lack of incriminating conversations involving Mr. Thomas, the falsities relating to Mr. Thomas's criminal history in the search warrant affidavits, and the sufficiency of the evidence recovered during a trash pull were discussed. As an experienced defense attorney, counsel exercised his judgment and raised those issues he thought would be the most successful. Mr. Thomas fails to overcome the presumption that this was a sound legal strategy and that his counsel's conduct did not**{2022 U.S. Dist. LEXIS 10}** comply with the prevailing professional norms.

Mr. Thomas's second allegation is that his counsel failed to advise him of the procedural requirements of a Franks hearing. A defendant's challenge of the veracity of an affidavit "must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or reckless disregard for the truth, and those allegations must be accompanied by an offer of proof." *Franks v. Delaware*, 438 U.S. 154, 171, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). Mr. Thomas argues that his counsel's failure to advise him of this deprived him of a right to a full and fair Franks hearing; however, Mr. Thomas does not offer any evidence as to how he was prejudiced by this failure. He does not state that he could have offered the requisite proof and fails to prove that his challenge of the affidavit was more than "conclusory" and a "mere desire to cross-examine." *Id.*

Mr. Thomas's third allegation is that his counsel failed to obtain investigation reports Detective Fields used in his search warrant affidavit. Mr. Thomas's counsel had access to all the discovery materials from the Ohio investigation and all the communications intercepted during the Pennsylvania investigation that related to Mr. Thomas. His counsel**{2022 U.S. Dist. LEXIS 11}** was also in communication with the prosecutor from the Pennsylvania Office of Attorney General responsible for the investigation in Pennsylvania. Mr. Thomas's counsel exercised his professional judgment in not reviewing the Pennsylvania investigative reports. In addition, Mr. Thomas cannot show that he was prejudiced. He asserts that the reports would show inconsistencies between the reports and the affidavits and diminish probable cause to search his house and barbershop; however, this unfounded

suspicion does not amount to actual prejudice.

Mr. Thomas's final allegation is that his counsel failed to raise the issue that the § 924(c)(1)(A) charge was unconstitutional on appeal. As discussed above, § 924(c)(1)(A) criminalizes mere possession and raising this issue on appeal would have been meritless, which Mr. Thomas admits in his Reply to the Government's Response. (ECF #120). Mr. Thomas's counsel was not required to raise on appeal "meritless arguments to avoid a charge of ineffective assistance of counsel." *Ryal v. Lafler*, 508 Fed. App'x 516, 520 (6th Cir. 2012) (quoting *Ludwig v. United States*, 162 F.3d 456, 459 (6th Cir. 1998)). This Court concludes that Mr. Hagar has failed to show that his counsel was ineffective under *Strickland*. 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

**Certificate of Appealability**

Pursuant to 28 U.S.C. § 2253, the Court must determine whether to grant a certificate**{2022 U.S. Dist. LEXIS 12}** of appealability as to any of the claims presented in the Petition. 28 U.S.C. § 2253 provides, in part, as follows:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

In order to make "substantial showing" of the denial of a constitutional right, as required under 28 U.S.C. § 2255(c)(2), a habeas prisoner must demonstrate "that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issue presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983)).

Where a district court has rejected the constitutional claims on the merits, the petitioner must demonstrate only that reasonable jurists would find the district court's assessment**{2022 U.S. Dist. LEXIS 13}** of the constitutional claims debatable or wrong. *Slack*, 529 U.S. at 484. For the reasons stated above, the Court concludes that Mr. Thomas has failed to make a substantial showing of the denial of a constitutional right and there is no reasonable basis upon which to debate this Court's procedural rulings. Accordingly, the Court declines to issue a certificate of appealability.

For the reasons set forth above, Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 (ECF #112) is DENIED. Because the files and records in this case conclusively show that Petitioner is entitled to no relief under § 2255, no evidentiary hearing is required to resolve the pending Motion. Furthermore, the Court certifies pursuant to 28 U.S.C. § 1915(a)(3), that an appeal of this decision could not be taken in good faith and that there is no basis on which to issue a certificate of appealability. 28 U.S.C. § 2253; Fed.R.App.P. 22(b).

IT IS SO ORDERED.

/s/ Donald C. Nugent

Donald C. Nugent

United States District Judge

DATED: March 29, 2022

JUDGMENT

For the reasons set forth in this Court's Memorandum Opinion and Order, Petitioner's Motion to Vacate, Set Aside, or Correct Sentence in Accordance with Title 28 U.S.C. § 2255 is DENIED. The court hereby orders that this case be dismissed with prejudice. Furthermore,**{2022 U.S. Dist. LEXIS 14}** the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis on which to issue a certificate of appealability. 28 U.S.C. § 2253; Fed.R.App.P. 22(b).

IT IS SO ORDERED.

/s/ Donald C. Nugent

Donald C. Nugent

United States District Judge

DATED: March 29, 2022

**UNITED STATES OF AMERICA, Plaintiff - Appellee, v. JAMES D. THOMAS, Defendant - Appellant.**
**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**
**852 Fed. Appx. 189; 2021 U.S. App. LEXIS 11884; 2021 FED App. 0202N (6th Cir.)**
**21a0202n.06No. 20-3306**
**April 20, 2021, Filed**

**Notice:**

**NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.**

**Editorial Information: Subsequent History**

Post-conviction relief denied at, Judgment entered by, Dismissed by Thomas v. United States, 2022 U.S. Dist. LEXIS 57535, 2022 WL 911777 (N.D. Ohio, Mar. 29, 2022)

**Editorial Information: Prior History**

**{2021 U.S. App. LEXIS 1}**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

**Counsel** For UNITED STATES OF AMERICA, Plaintiff - Appellee: Daniel R. Ranke, Assistant U.S. Attorney, Office of the U.S. Attorney, Cleveland, OH.
For JAMES D. THOMAS, Defendant - Appellant: James A. Jenkins, Law Offices, Cleveland, OH.

**Judges:** BEFORE: GIBBONS, WHITE, and THAPAR, Circuit Judges.

**CASE SUMMARY**Court properly denied motion to suppress evidence seized from defendant's home as even with erroneous criminal history assertions excluded, the affidavit contained overwhelming evidence of probable cause, U.S. Const. amend. IV; he presented no evidence that misrepresentations were knowing, intentional, or made with reckless disregard for the truth.

**OVERVIEW:** HOLDINGS: [1]-The district court properly denied defendant's motion to suppress evidence seized from his home because even with the erroneous criminal history assertions excluded, the affidavit for the search of his home contained overwhelming evidence of probable cause, U.S. Const. amend. IV; defendant presented no evidence that misrepresentations in the affidavit were knowing, intentional, or made with reckless disregard for the truth, no evidence to suggest that the inclusion of an arrest for possession of cocaine rather than marijuana was anything other than a negligent error, and there was clear evidence that the erroneous inclusion of a conviction for illegal manufacture of drugs was the result of an error in the Law Enforcement Automated Data System. Defendant also failed to make a showing that false information was included intentionally or with reckless disregard for the truth.

**OUTCOME:** Judgment affirmed.

**LexisNexis Headnotes**

***Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause > Particularity***
***Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection***
***Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Probable Cause***
***Criminal Law & Procedure > Search & Seizure > Search Warrants > Particularity***
***Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Warrants***

A basic principle of the Fourth Amendment is that there must be probable cause for a search warrant to issue. U.S. Const. amend. IV provides that no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. Probable cause is defined as reasonable grounds for belief, supported by less than prima facie proof but more than mere suspicion. In determining whether a warrant passes muster under the Fourth Amendment, the key inquiry is whether there is reasonable cause to believe that the specific things to be searched for and seized are located on the property to which entry is sought.

***Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Probable Cause***
***Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Warrants***
***Criminal Law & Procedure > Search & Seizure > Search Warrants > Affirmations & Oaths > Examination Upon Application***
***Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause > Particularity***

Where an affidavit is the basis for a probable cause determination, that affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause. Where police are seeking a warrant to search for illegal drugs, the affidavit must establish a fair probability that the drugs will be found in a particular place.

***Criminal Law & Procedure > Appeals > Deferential Review > Probable Cause Determinations***

Appellate courts review a district court's determination of probable cause under two complementary standards. Factual findings are upheld unless they are clearly erroneous while legal conclusions are reviewed de novo. When determining whether an affidavit establishes probable cause, appellate courts look only to the four corners of the affidavit; information known to the officer but not conveyed to the magistrate is irrelevant. Importantly, appellate courts afford great deference to the issuing judge's findings in support of a search warrant and will not set them aside unless they were arbitrary.

***Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Warrants***
***Criminal Law & Procedure > Search & Seizure > Search Warrants > Affirmations & Oaths > Sufficiency Challenges***
***Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection***
***Criminal Law & Procedure > Search & Seizure > Search Warrants > Affirmations & Oaths > Examination of Affiants***
***Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Probable Cause***

Where a defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment

requires that a hearing be held at the defendant's request.

***Evidence > Procedural Considerations > Objections & Offers of Proof > Offers of Proof***

Allegations of negligence or innocent mistake are insufficient, and allegations of deliberate falsehood or of reckless disregard for the truth must be accompanied by an offer of proof.

***Evidence > Inferences & Presumptions > Inferences***

It is correct that if the affidavit fails to include facts that directly connect the residence with the suspected drug-dealing activity, or the evidence of this connection is unreliable, it cannot be inferred that drugs will be found in the defendant's home-even if the defendant is a known drug dealer.

***Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Good Faith***
***Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Exclusionary Rule***
***Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Rule Application & Interpretation***
***Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Scope***
***Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Reasonable Reliance Upon Warrant***

The fruits of a search performed subject to an otherwise validly issued warrant are not automatically excluded if a court later finds that the warrant was not supported by probable cause. Whether the exclusionary rule is appropriately imposed in a particular case, appellate courts' decisions make clear, is an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct. The exclusionary rule does not bar the admission of evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective. This is commonly referred to as the good-faith exception.

***Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Good Faith***
***Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Reasonable Reliance Upon Warrant***

The good-faith exception is inapplicable, and suppression of evidence is appropriate, in four situations: (1) where the issuing magistrate was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth; (2) where the issuing magistrate wholly abandoned his judicial role and failed to act in a neutral and detached fashion, serving merely as a rubber stamp for the police; (3) where the affidavit was nothing more than a bare bones affidavit that did not provide the magistrate with a substantial basis for determining the existence of probable cause, or where the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) where the officer's reliance on the warrant was not in good faith or objectively reasonable, such as where the warrant is facially deficient.

***Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Reasonable Reliance Upon Warrant***
***Criminal Law & Procedure > Search & Seizure > Search Warrants > Confidential Informants > Credibility, Reliability & Veracity***

The "bare bones" label is reserved for an affidavit that merely states suspicions, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge. Thus, the question is whether the affidavit's lack of reliable evidence supporting a nexus between the

alleged illegal activity and the place to be searched made the officer's reliance on the warrant objectively unreasonable.

***Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Probable Cause***
***Criminal Law & Procedure > Search & Seizure > Search Warrants > Confidential Informants > Identity of Informant***

Where the only nexus between the criminal activity and the place to be searched came from an anonymous tipster, with little corroboration, no reasonable officer would believe that the affidavit established probable cause.

***Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Good Faith***

Because of the fact-intensive nature of the good-faith/objectively reasonable inquiry, there is no bright-line rule establishing when an officer's reliance on a warrant subsequently determined to lack probable cause is reasonable.

***Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Good Faith***
***Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Reasonable Reliance Upon Warrant***

District courts are generally required to restrict their good-faith analysis to information within the four corners of the affidavit. A determination of good-faith reliance, like a determination of probable cause, must be bound by the four corners of the affidavit. Whether an objectively reasonable officer would have recognized that an affidavit was so lacking in indicia of probable cause as to preclude good faith reliance on the warrant's issuance can be measured only by what is in that affidavit.

***Criminal Law & Procedure > Search & Seizure > Search Warrants > Execution of Warrant***
***Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Good Faith***

Good-faith is ultimately a question of officer reasonableness in executing the warrant, not the reasonableness of the issuing magistrate.

***Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Warrants***
***Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Good Faith***
***Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Reasonable Reliance Upon Warrant***

The focus of a good-faith inquiry is whether the officers who executed the search reasonably relied on the relevant warrant, not whether the affiant was reasonable in requesting the warrant in the first place.

**Opinion**

**Opinion by:** HELENE N. WHITE

**Opinion**

**{852 Fed. Appx. 190} HELENE N. WHITE, Circuit Judge**. Appellant James D. Thomas entered

conditional pleas of guilty to multiple charges after his motions to suppress evidence seized from his home and the barber shop where he worked1 were denied. He appeals, arguing that the affidavit submitted in support of the search warrant for his home contained false information, and that both affidavits failed to establish probable cause. We AFFIRM.

I.

On July 26, 2018, the Summit County Court of Common Pleas signed a search warrant for Thomas's primary residence located at 509 Patterson Avenue in Akron, Ohio. The application for the warrant included an affidavit signed by Task Force Officer Jimmy Fields, of the Summit County Sheriff's Office. The affidavit contained substantial information establishing that Sondra McQuillen was a distributor**{2021 U.S. App. LEXIS 2}** of methamphetamine in Pennsylvania, as well as evidence linking her with Thomas. The affidavit explained that pen registers placed on McQuillen's phone revealed that she took trips from Clearfield County, Pennsylvania, to Akron, Ohio, (approximately six hours roundtrip by car) on a weekly or bi-weekly basis, and that she had done so at least twenty-two times. On July 1-2, 2018, McQuillen was in contact with an individual named Ronnie Sue Hummel, and their intercepted communications suggested that McQuillen was collecting money from Hummel before making a "trip." On July 3, 2018, McQuillen texted a cell phone used by Thomas, stating "be there in 10 [minutes]" to which Thomas replied "cool." GPS data from McQuillen's phone showed that in this same time frame McQuillen was in the Akron area for a short amount of time before returning to Pennsylvania.

On July 9, 2018, Hummel was once again in communication with McQuillen and said that she was going to bring McQuillen money because she needed "stuff." On July 11, 2018, McQuillen exchanged cars with Hummel because hers was having problems. Later that day, law enforcement followed McQuillen, who was a passenger in the Mazda borrowed from Hummel,**{2021 U.S. App. LEXIS 3}** from Clearfield County to Akron. During the drive, McQuillen called Thomas's number and advised that she was about an hour away, and subsequently texted that she would arrive in fifteen minutes or less. Investigators observed McQuillen in the area of the Top Notch Barber Shop at 1495 Aster Avenue, Akron, Ohio. Another officer observed the Mazda park in front of the entrance to the Top Notch Barber Shop at 9:24 p.m. A few minutes later the same officer "observed a male walk into the Top Notch Barber Shop." He subsequently "observed a female inside Top Notch Barber Shop while a male remained inside" the Mazda. Approximately twenty minutes later the female and a Black male exited the barber shop. The Mazda departed and drove back in the direction of Clearfield County. Police observed the male, who matched the description of Thomas, enter a vehicle registered to Thomas, and return to 509 Patterson Avenue, Akron, Ohio, after making a single **{852 Fed. Appx. 191}** stop at a gambling store. On July 12, Hummel called McQuillen to complain about methamphetamine she received and McQuillen responded that it was from the "same person."

On the night of July 25, 2018, McQuillen placed a call to Thomas's phone number and told him she would be leaving**{2021 U.S. App. LEXIS 4}** at 4:00 am and arriving around 7:00 or 8:00 am. The next morning agents observed McQuillen traveling with an unknown male to Akron. At 7:43 am, agents observed McQuillen drop her unknown passenger off at a gas station, and shortly thereafter, park in the driveway of and enter the residence at 509 Patterson Avenue. Approximately thirty minutes later, McQuillen was seen departing 509 Patterson Avenue. She then picked up her passenger at the gas station and traveled back to Pennsylvania. Early that afternoon, Pennsylvania police conducted a traffic stop of McQuillen's vehicle, and executed a search warrant for the vehicle, during which they found six ounces of methamphetamine, one-eighth-ounce of cocaine, and one ounce of marijuana in McQuillen's purse.

In addition to detailing the surveillance of McQuillen, the affidavit stated that police had done a

trash-pull at Thomas's home, on July 16, 2018, and discovered three rubber gloves and two pieces of foodsaver vacuum seal plastic. The police checked the mailbox at the address and found mail addressed to James D. Thomas at 509 Patterson Avenue. The affidavit also asserted that Thomas had the following criminal history: A 1998 arrest for felonious assault, misrepresenting**{2021 U.S. App. LEXIS 5}** identity, drug abuse (marijuana), probation violation, and having weapons under disability, which resulted in a conviction for aggravated assault; a 2003 arrest for failure to comply with the order of a police officer, obstructing official business, and possession of cocaine, which resulted in a conviction for failure to comply with the orders of a police officer; a 2004 conviction for illegal manufacture of drugs; and a 2014 conviction for violating a prohibition on conveyance of weapons, drugs of abuse, or intoxicating liquor onto the grounds of a specified government facility.

Agents executed the search warrant for the Patterson Avenue home the same day it was issued. They recovered 28 grams of crystal methamphetamine, 32 grams of cocaine, a large amount of U.S. currency, and firearms.

Later that day, the agents obtained a second search warrant, this time for the Top Notch Barber Shop, located at 1495 Aster Avenue in Akron, Ohio. The affidavit in support of the second search warrant was much less detailed than the first affidavit, and contained the following relevant assertions:

> On July 26, 2018 Affiant is aware that the Summit County Drug Unit and the Drug Enforcement Administration**{2021 U.S. App. LEXIS 6}** executed a search warrant at 509 Patterson Avenue. Affiant is aware that 509 Patterson Avenue is the residence of James Deshaun Thomas SSN: 300-68-2828 DOB: 12/23/1969. Affiant is aware that during the search of the residence, detectives recovered 28 grams of crystal methamphetamine, 32 grams of cocaine, a large amount of US currency and numerous firearms.
>
> Affiant is aware that detectives from the Summit County Drug Unit and agents from the Drug Enforcement Administration were actively watching Thomas at his barber shop located at 1495 Aster Avenue, during the search of his residence. Affiant is aware that at approximately 7:30 P.M. on July 26, 2018, Sergeant Nicholas Goodnite observed Thomas exit "Top Notch Barber Shop" and appear to lock the door from the outside utilizing a key. Affiant is aware **{852 Fed. Appx. 192}** that Thomas was taken into custody and transported to the Summit County Jail. Affiant is aware that SA Paul Straney used the key that was recovered from Thomas's person and actuated the door lock at 1495 Aster.
>
> Affiant is aware that on the 6th of February 2018 Affiant and Detective Ryan Knight interviewed an inmate at the Summit County Jail. Affiant is aware that this inmate gave information**{2021 U.S. App. LEXIS 7}** regarding James Thomas selling crystal methamphetamine and cocaine out of the Top Notch Barber Shop at 1495 Aster Avenue.

Agents executed the search warrant immediately and recovered a handgun and ammunition, a bag with 456 grams of methamphetamine, a separate bag with 286 grams of methamphetamine, a bag with 82 grams of cocaine, another bag with 60 grams of cocaine, 2 digital scales, 120 grams of marijuana, and an additional 1,330 grams of marijuana.

On August 15, 2018, Thomas was charged in a five-count indictment with possession with the intent to distribute over 500 grams of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A), (Count 1); possession with the intent to distribute approximately 122 grams of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B), (Count 2); possession with the intent to distribute cocaine, in violation of §§ 841(a)(1) and (b)(1)(C), (Count 3); being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and 2 (Count 4); and

possession of a firearm in furtherance of a drug trafficking offense, in violation of 18 U.S.C. § 924(c)(1)(A), (Count 5).

Thomas filed several motions to suppress the evidence seized from the Patterson Avenue home and the Top Notch Barber Shop. Thomas argued that both affidavits failed to establish probable cause to support**{2021 U.S. App. LEXIS 8}** the searches. Thomas also requested a *Franks* hearing, asserting that the criminal-history section of the first affidavit falsely asserted that Thomas had a 2003 arrest for possession of cocaine and a 2004 conviction for Illegal Manufacture of Drugs.

The district court conducted a hearing on Thomas's suppression motions, focused primarily on the need for a *Franks* hearing. The government conceded that the 2004 conviction for Illegal Manufacture of Drugs was erroneously included as part of Thomas's criminal history in the first affidavit. The affiant for the first warrant, Task Force Officer Jimmy Fields, testified that when preparing an affidavit to support a search warrant, he uses the Law Enforcement Automated Data System (LEADS) to determine a suspect's criminal history, and that he is certified to use LEADS, has been using it regularly for several years, and believes it to be generally reliable. Fields testified that the conviction for illegal manufacturing of drugs included as part of Thomas's criminal history was pulled directly from the LEADS report for Thomas. After the error in the affidavit was raised by defense counsel, Fields investigated the issue and found that the local**{2021 U.S. App. LEXIS 9}** jail had intermingled the FBI number for Thomas with that of another James Thomas from Akron, and the other man's criminal history had erroneously been incorporated into Thomas's record. Fields testified that there were no obvious discrepancies in the LEADS printout, so he did not have reason to crosscheck other sources to confirm the accuracy of the LEADS report.

Fields also admitted that his affidavit incorrectly stated that Thomas was arrested on November 24, 2003 for possession of cocaine (among other non-drug-related offenses), despite the LEADS report correctly **{852 Fed. Appx. 193}** stating that the arrest was for possession of marijuana. Fields testified that the inclusion of possession of cocaine rather than possession of marijuana was a "typographical error," and was not intentional.

The district court denied Thomas's motions to suppress. The court acknowledged that there were erroneous entries in the criminal-history section of the affidavit supporting the search warrant for Thomas's home, but found that Officer Fields had "every right" to rely on the LEADS report to determine Thomas's criminal history and that the errors in the affidavit were not intentional. The court further found that even if**{2021 U.S. App. LEXIS 10}** the two erroneous criminal-history entries were excluded from the affidavit, the affidavit nonetheless contained "overwhelming evidence of probable cause." The district court also found that the affidavit supporting the search of the Barber Shop contained "overwhelming probable cause."

On November 20, 2019, Thomas pleaded guilty to Counts 1-9 of the Superseding Indictment, preserving the right to appeal the denial of his motions to suppress, and was sentenced to 180-months' imprisonment.2

II.

A basic principle of the Fourth Amendment is that there must be probable cause for a search warrant to issue. *United States v. Helton*, 314 F.3d 812, 819 (6th Cir. 2003); *see also* U.S. CONST. amend. IV ("[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."). "Probable cause is defined as 'reasonable grounds for belief, supported by less than *prima facie* proof but more than mere suspicion.'" *United States v. King*, 227 F.3d 732, 739 (6th Cir. 2000) (quoting *United States v. Bennett*, 905 F.2d 931, 934 (6th Cir. 1990)). In determining whether a warrant passes

muster under the Fourth Amendment, the key inquiry is whether "there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Zurcher v. Stanford Daily*, 436 U.S. 547, 556, 98 S. Ct. 1970, 56 L. Ed. 2d 525 (1978).

"[W]here an affidavit is the basis**{2021 U.S. App. LEXIS 11}** for a probable cause determination, that affidavit 'must provide the magistrate with a substantial basis for determining the existence of probable cause.'" *Helton*, 314 F.3d at 819 (quoting *Illinois v. Gates*, 462 U.S. 213, 239, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). Where police are seeking a warrant to search for illegal drugs, the affidavit must establish "'a fair probability' **{852 Fed. Appx. 194}** that the drugs 'will be found in a particular place.'" *United States v. Church*, 823 F.3d 351, 355 (6th Cir. 2016) (quoting *Gates*, 462 U.S. at 238).

We review a district court's determination of probable cause "under two 'complementary' standards." *Helton*, 314 F.3d at 820. (quoting *United States v. Leake*, 998 F.2d 1359, 1362 (6th Cir. 1993). Factual findings are upheld unless they are clearly erroneous while legal conclusions are reviewed *de novo*. *Id.* "When determining whether an affidavit establishes probable cause, we look only to the four corners of the affidavit; information known to the officer but not conveyed to the magistrate is irrelevant." *United States v. Abernathy*, 843 F.3d 243, 249 (6th Cir. 2016) (quoting *United States v. Brooks*, 594 F.3d 488, 492 (6th Cir. 2010). Importantly, we afford "great deference to the issuing judge's findings in support of a search warrant and will not set them aside unless they were arbitrary." *Helton*, 314 F.3d at 820 (internal quotations omitted).

**A.**

Thomas asserts that the affidavit supporting the search warrant for his house contained incorrect information regarding his criminal history. The government concedes that the affidavit misrepresented an arrest for possession**{2021 U.S. App. LEXIS 12}** of marijuana as possession of cocaine, and that it erroneously included a conviction for illegal manufacture of drugs. Under established Supreme Court precedent,

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.*Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). "Allegations of negligence or innocent mistake are insufficient," and "allegations of deliberate falsehood or of reckless disregard for the truth . . . must be accompanied by an offer of proof." *Id.* at 171.

Thomas presented no evidence that the misrepresentations**{2021 U.S. App. LEXIS 13}** in the affidavit were knowing, intentional, or made with reckless disregard for the truth. There is no evidence in the record to suggest that the inclusion of an arrest for possession of cocaine rather than marijuana was anything other than a negligent error. And there was clear evidence that the erroneous inclusion of a conviction for illegal manufacture of drugs was the result of an error in the LEADS system, a system which law enforcement officers regularly utilize to determine suspects' criminal histories. Thomas argues that Fields showed reckless disregard for the truth by failing to cross-check the LEADS criminal history with easily accessible Summit County criminal records, and

in general by failing to provide correct information in the affidavit. But Fields testified that there was no indication that the LEADS criminal history was incorrect, and that it was generally a reliable source for criminal histories. Fields's failure to cross-check the LEADS record was not indicative of recklessness, and thus, the district court correctly **{852 Fed. Appx. 195}** concluded that Thomas failed to make a showing that false information was included in the affidavit intentionally or with a reckless disregard for**{2021 U.S. App. LEXIS 14}** the truth.

In any event, we agree with the district court that even with the erroneous criminal-history assertions excluded, the affidavit for the search of the Patterson Avenue home contained overwhelming evidence of probable cause.

Thomas argues that the evidence suggesting he was involved in drug dealing was too circumstantial to provide probable cause and that there was not a sufficient nexus between the alleged illegal activity and his home. Thomas asserts that Fields's conclusion that Thomas was dealing drugs to McQuillen, based on the context of McQuillen's contact and communications with Thomas, was too speculative to support probable cause. Thomas is correct that none of the individual facts or assertions in the affidavit directly establish that Thomas was dealing drugs. The phone conversations and text messages involving Thomas detailed in the affidavit include no mention or reference to drugs, drug transactions, or drug-related jargon, and although the police saw McQuillen and Thomas exit the Top Notch Barber Shop together during one of McQuillen's trips, they did not observe what occurred during the thirty-minutes the two were inside. However, considering the assertions in**{2021 U.S. App. LEXIS 15}** the affidavit as a whole, it is clear that probable cause was established. *United States v. Christian*, 925 F.3d 305, 312 (6th Cir. 2019) (courts are required to "look holistically at what the affidavit does show, instead of focusing on what the affidavit does not contain, or the flaws of each individual component of the affidavit."). McQuillen's status as a known drug dealer, the context of McQuillen's visits to Thomas shortly after conversations with her customer, and the fact that she was found with large quantities of drugs after meeting Thomas at his home, all raise the strong suspicion that Thomas was involved in drug dealing, and that he was utilizing his home to sell drugs.

It is correct that "if the affidavit fails to include facts that directly connect the residence with the suspected drug-dealing activity, or the evidence of this connection is unreliable, it cannot be inferred that drugs will be found in the defendant's home-even if the defendant is a known drug dealer." *Brown*, 828 F.3d 375, 384 (6th Cir. 2016). But the context of McQuillen's trips to Akron, and the fact that she was found with drugs after meeting with Thomas *at his home* clearly establish a nexus between the suspected drug dealing and Thomas's home. This is not a case where the nexus between the suspected**{2021 U.S. App. LEXIS 16}** criminal activity and the place to be searched was "too vague or generalized to support a search warrant." *Id.* at 382; *see also United States v. Carpenter*, 360 F.3d 591, 595 (6th Cir. 2004) (evidence that marijuana plants were growing near the residence and that a road connected the residence to the plants was "too vague, generalized, and insubstantial to establish probable cause").

Thus, notwithstanding the incorrect criminal-history information, the district court properly denied Thomas's motion to suppress the evidence seized from his home.

**B.**

Thomas next argues that the search warrant for the Top Notch Barber Shop lacked probable cause because the affidavit relied on a stale statement from an unverified informant, was boilerplate, established no nexus to any illegal activity, and was the fruit of the illegal search of his home. Given our determination that the search of Thomas's home was supported by probable **{852 Fed. Appx. 196}** cause, we reject Thomas's fruit-of-the-poisonous tree argument without further analysis.

Although the district court found that the search of the barber shop was supported by "overwhelming probable cause," the factual allegations in the affidavit in support of the warrant were undeniably sparse: The affidavit included three factual assertions in**{2021 U.S. App. LEXIS 17}** support of probable cause: (1) the search warrant executed on Thomas's home resulted in the recovery of substantial amounts of crystal methamphetamine, cocaine, a large amount of U.S. Currency, and numerous firearms, (2) detectives were actively watching Thomas during the search of his residence, and observed him exit the Top Notch Barber Shop and lock the door utilizing a key; and (3) on February 6, 2018, affiant and another officer interviewed an inmate at the Summit County Jail who gave information regarding Thomas selling crystal methamphetamine and cocaine out of the Top Notch Barber Shop.

Although the discovery of drugs at Thomas's home supports the conclusion that Thomas himself was involved in illegal drug activity, that alone is not enough to support the inference that drugs would likely be found at Thomas's place of work. Nor does the fact that Thomas exercised some level of control over the Barber Shop, as demonstrated by his locking the shop, sufficient to support such a conclusion. The tip from the confidential informant is the only information contained in the affidavit that arguably ties any criminal activity to the location to be searched. The problem, though, as Thomas**{2021 U.S. App. LEXIS 18}** points out, is that the affidavit provides no indication of the informant's basis of knowledge, nor any indication of why the statement is reliable.

We need not reach a firm conclusion as to probable cause because, regardless, the evidence was admissible under the good-faith exception. Under *Leon*, the fruits of a search performed subject to an otherwise validly issued warrant are not automatically excluded if a court later finds that the warrant was not supported by probable cause. *United States v. Leon*, 468 U.S. 897, 906, 104 S. Ct. 3405, 82 L. Ed. 2d 677 ("Whether the exclusionary rule is appropriately imposed in a particular case, our decisions make clear, is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'") (quoting *Gates*, 462 U.S. at 223). The exclusionary rule does not bar the admission of evidence "seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective." *Id.* at 905. This is commonly referred to as the "good-faith exception." *United States v. Rice*, 478 F.3d 704, 711 (6th Cir. 2007). The good-faith exception is inapplicable, and suppression of evidence is appropriate, in four situations:

> (1) where the issuing magistrate was misled by information in an affidavit that the affiant knew was false or would have known**{2021 U.S. App. LEXIS 19}** was false except for his reckless disregard for the truth; (2) where the issuing magistrate wholly abandoned his judicial role and failed to act in a neutral and detached fashion, serving merely as a rubber stamp for the police; (3) where the affidavit was nothing more than a "bare bones" affidavit that did not provide the magistrate with a substantial basis for determining the existence of probable cause, or where the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) where the officer's reliance on the warrant was not in good **{852 Fed. Appx. 197}** faith or objectively reasonable, such as where the warrant is facially deficient.*United States v. Hython*, 443 F.3d 480, 484 (6th Cir. 2006).

Given that there was no false information included in the affidavit for the Top Notch Barber Shop, nor any reason to believe that the issuing magistrate wholly abandoned her judicial role, situations one and two are inapplicable. And although the affidavit in this case was sparse, it was not so lacking in factual allegations that it could be considered "bare bones." *See Christian*, 925 F.3d at 312 (explaining that the "bare bones" label is reserved "for an affidavit that merely 'states suspicions, or conclusions, without providing**{2021 U.S. App. LEXIS 20}** some underlying factual circumstances

regarding veracity, reliability, and basis of knowledge'" (quoting *United States v. Washington*, 380 F.3d 236, 241 n.4 (6th Cir. 2004))). Thus, the question is whether the affidavit's lack of reliable evidence supporting a nexus between the alleged illegal activity and the place to be searched made the officer's reliance on the warrant objectively unreasonable.

This Court has had numerous occasions to explore the parameters of "objective reasonableness" in the context of affidavits that failed to establish a sufficient nexus between illegal activity and the place to be searched, and has arrived at different conclusions based on the specific facts alleged in the affidavits. *See Carpenter*, 360 F.3d at 596 (finding that an affidavit describing a marijuana field near a residence, with a road between the field and the residence, was not sufficient to establish probable cause, but that officers reliance on the warrant was not objectively unreasonable); *United States v. Laughton*, 409 F.3d 744, 751 (6th Cir. 2005) (holding that where an affidavit merely indicated that a confidential informant had observed controlled substances at or in the residence or located on the person of a suspect, without any description of the timing of these observations, or where the residence was, there was no connection between**{2021 U.S. App. LEXIS 21}** the criminal activity at issue and the place to be searched, and therefore no reasonable officer would have believed the warrant to be reliable); *Helton*, 314 F.3d at 824-25 (holding that where the only nexus between the criminal activity and the place to be searched came from an anonymous tipster, with little corroboration, no reasonable officer would believe that the affidavit established probable cause); *United States v. Van Shutters*, 163 F.3d 331, 337 (6th Cir. 1998) (holding that the police reasonably relied on warrant that failed to provide a sufficient nexus for probable cause because the affidavit contained extensive detail describing the place to be searched, the nature of the criminal enterprise in which the defendant was involved, the instrumentalities of that enterprise, and the status of the police investigation, in combination with the statement that the rooms in the residence "were available to" the defendant). Because of the fact-intensive nature of the good-faith/objectively reasonable inquiry, there is no bright-line rule establishing when an officer's reliance on a warrant subsequently determined to lack probable cause is reasonable.

An obvious wrinkle in the good-faith analysis here is the fact that evidence included in the affidavit for the search of**{2021 U.S. App. LEXIS 22}** Thomas's home, but inexplicably omitted from the Top Notch Barber Shop affidavit, would have undoubtedly supported a finding of probable cause to search the barber shop. We know from the first affidavit that police had observed McQuillen, a known drug dealer, travel long distances from out of state to stop for a short period at the Top Notch Barber Shop; that she had been in contact with Thomas regarding the visits; and that there was evidence that she **{852 Fed. Appx. 198}** went on these trips when her supply of drugs was low, and sold drugs to regular customers immediately following her return. When paired with the discovery of drugs and weapons at Thomas's home, where McQuillen had also been observed meeting with Thomas, these facts would undoubtedly have supported probable cause to search the barber shop. But none of this highly probative information was included in the Top Notch Barber Shop affidavit.

In the Sixth Circuit, district courts are generally required to restrict their good-faith analysis to information within the four corners of the affidavit. In *Laughton*, this court explicitly held that,

> a determination of good-faith reliance, like a determination of probable cause, must be bound by the four**{2021 U.S. App. LEXIS 23}** corners of the affidavit. Whether an objectively reasonable officer would have recognized that an affidavit was so lacking in indicia of probable cause as to preclude good faith reliance on the warrant's issuance can be measured only by what is in that affidavit.*Laughton*, 409 F.3d at 751-52. But the court carved out a narrow exception to this rule in *Frazier*, explaining "[b]ecause the Supreme Court has, in the past, looked beyond the four corners of the warrant affidavit in assessing an officer's good faith, we do not read *Laughton* as prohibiting a court in *all* circumstances from considering evidence not included in the affidavit."

*United States v. Frazier*, 423 F.3d 526, 534 (6th Cir. 2005). The court in *Frazier* read *Laughton* as limited to whether a search could be "saved under the 'good faith exception' on the basis that the officers had other information that was not presented to the issuing magistrate, but that would have established probable cause." *Id.* at 535 (internal quotations omitted). This Court in *Frazier* found that the good-faith exception could apply where information clearly known and considered by the magistrate, but inadvertently excluded from an affidavit, supported a finding of probable cause. *Id.* at 534-35. The court explained that the rationale underpinning *Leon* could not**{2021 U.S. App. LEXIS 24}** support a rule excluding information "known to the officer and revealed to the magistrate." *Id.* at 535.

Here, the same magistrate considered and issued both warrants-for the house and the barber shop-and did so on the same day. Thus, it is difficult to imagine that the magistrate did not recall and consider the highly relevant facts put forth in the first affidavit when evaluating whether there was probable cause to search the Top Notch Barber Shop. This does not end the inquiry, though, because good-faith is ultimately a question of officer reasonableness in executing the warrant, not the reasonableness of the issuing magistrate.

In *Frazier*, the court found that the good-faith exception applied where a magistrate requested that a set of affidavits be amended to include information corroborating the veracity of information provided by a confidential informant, and the magistrate issued six search warrants although the additional information was inadvertently added to only five of the affidavits. *Id.* at 532-33. In *Frazier*, it could be reasonably assumed that both the magistrate's assessment of probable cause, as well as the officer's reliance on the warrant, were based on the assumption that the sixth affidavit**{2021 U.S. App. LEXIS 25}** also included the requested revisions that were made to the first five affidavits, and which supported probable cause. Here, the analysis is not quite as simple. Different officers prepared and signed the affidavits for the Patterson Avenue home and the Top Notch Barber Shop, so it is not as clear that the officer's reliance on the warrant for the Top Notch **{852 Fed. Appx. 199}** Barber Shop was informed by the facts included in the first affidavit; nor is it obvious that the officer knew that the magistrate had previously been informed of additional relevant facts. Nonetheless, Fields, the affiant for the first warrant, testified that he was involved in the execution of the Top Notch Barber Shop warrant and that the two searches involved the same team of officers. The focus of the good-faith inquiry is whether the officers who executed the search reasonably relied on the relevant warrant, not whether the affiant was reasonable in requesting the warrant in the first place. And although in most cases there would be no need to parse these details, here the distinction is crucial. Although it may have been unreasonable for the officer who prepared the affidavit and requested the warrant to assume that the sparse**{2021 U.S. App. LEXIS 26}** details provided in the affidavit were sufficient to support probable cause, the team of officers executing the warrant3 were generally aware of both the evidence supporting probable cause to search Thomas's home and that those facts had been presented to the magistrate. *See* Hearing Transcript, R. 86, PID 454-55 (the affiant for the search warrant of Thomas's home also participated in the search of the Top Notch Barber Shop). Thus, the officers executing the warrant likely had little reason to question whether probable cause supported the warrant to search the Top Notch Barber Shop. For that reason, the narrow exception to the rule limiting the good-faith analysis to the four corners of the affidavit is applicable here. Considering the information included in the affidavit, as well as information known both to the team of officers executing the warrant and the issuing magistrate, we conclude that the search of the Top Notch Barber Shop was executed in good faith reliance on the warrant. Thus, we affirm the district court's denial of Thomas's motion to suppress the evidence seized from the barber shop.

III.

For the foregoing reasons, we AFFIRM.

## Footnotes

1

It is unclear from the record whether Thomas owned the barber shop or simply worked there. The distinction is unimportant to our analysis.

2

On October 8, 2019, the government filed a Superseding Indictment containing nine counts. The government represented that the Superseding Indictment merely separated the contraband found at the two locations into different counts, for the sake of clarity, but did not change the potential penalties. This was apparently an unintentional misrepresentation. Although splitting the drug charges to account for the different locations did not change the applicable mandatory minimum sentences, the superseding indictment split what was originally one firearm-possession charge into two, each carrying a five-year mandatory minimum sentence, to be served consecutively to any other sentence. Thomas was originally sentenced to a total of 240-months' imprisonment based on these mandatory minimums. He challenged the application of consecutive mandatory minimum sentences on Counts 8 and 9, arguing that the original indictment had included only one firearm-possession count and the government had represented that the superseding indictment would not impact any potential punishment. The parties reconvened and the government agreed to dismiss Count 9, which decreased Thomas's sentence to 180 months' imprisonment.

3

It is unlikely this officer was involved in the search itself, as it appears that the search was initiated nearly simultaneously with the magistrate's issuance of the warrant.

*Also a Member of the Florida Bar*

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January 4, 2021

**Inmate James D. Thomas**
**Clearfield County Jail**
115 21st St.
Clearfield, PA 16830

Re: *United States v. James D. Thomas*
NDOH Case No.: 5:18-cr-00461
6th Cir. Case. No.: 20-3306

Dear Mr. Thomas:

Please be advised that the Sixth Circuit granted an oral argument in your case, scheduled for Thursday, March 4, 2021 at 1:30 p.m. You will not be transported to participate in the hearing, as no inmates are allowed to be present for the hearing. We will find out who the panel of three (3) judges that will hear your case are approximately two (2) weeks before the oral argument date. Due to COVID-19, the oral argument could be held virtually or postponed. As soon as there is any update, I will let you know.

If you have any questions or need more information, please do not hesitate to contact my office at any time. Thank you for your attention to this matter.

Sincerely,

*James A. Jenkins*

JAMES A. JENKINS

JAJ/mls
*Enclosure*